	)	**IN THE COURT OF MILITARY**
	)	**COMMISSION REVIEW**
	)	
UNITED STATES,	)	**BRIEF ON BEHALF OF**
	)	**APPELLANT**
Appellant,	)	
	)	Case No. _____
v.	)	
	)	Interlocutory Appeal from the
	)	19 November 2008 Ruling of the
MOHAMMED JAWAD	)	Military Judge on the Defense
a/k/a "Amir Khan"	)	Motion to Suppress Out-of-Court
a/k/a "Mir Jan"	)	Statements By the Accused Made
a/k/a "Sakheb Badsha,"	)	While in U.S. Custody, D-021
	)	
Appellee.	)	
	)	Presiding Military Judge
	)	Colonel Stephen R. Henley

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

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STATEMENT OF STATUTORY JURISDICTION

This appeal is filed in accordance with 10 U.S.C. § 950d(a)(1)(B) and Rule for Military Commissions ("R.M.C.") 908(a)(2), in that the Military Judge's 19 November 2008 Ruling, *see United States v. Jawad*, Ruling on Defense Motion to Suppress Out-of-Court Statements Made By the Accused While in U.S. Custody, D-021 (Military Commission) (Henley, J.) ("19 November 2008 Ruling"), excluded evidence that is substantial proof of a fact material in the proceeding.

STATEMENT OF THE CASE

The accused is charged with attempted murder in violation of the law of war in connection with a grenade attack against U.S. forces in Kabul, Afghanistan, on the afternoon of 17 December 2002, in which two U.S. soldiers and their Afghan interpreter were seriously injured. *See* Exhibit K; Exhibit A at 1. Afghan authorities apprehended the accused at the scene and later that evening delivered him to U.S. military authorities, in whose custody he has remained. *See* Exhibit A at 1-2; A.E. 91 at 5; A.E. 89 at 11. The instant charges were sworn on 9 October 2007 and referred for trial by military commission on 30 January 2008. *See* Exhibit K.[1]

On 18 September 2008, the defense filed separate motions seeking to suppress confessions that the accused made both to the Afghan authorities in Kabul and later to the U.S. military authorities at Forward Operating Base (FOB) 195. Exhibits I and J. The government

[1] On 24 June 2008, the Military Commission dismissed Charge II and its three specifications alleging intentional infliction of serious bodily injury in violation of the law of war as lesser included offenses of Charge I and its three specifications alleging attempted murder in violation of the law of war. On 23 September 2008, in light of a separate Commission ruling unrelated to the instant appeal, the Convening Authority ratified her decision to refer the Charge and specifications to trial by military commission.

filed a consolidated response to both motions on 22 September 2008. Exhibit H. On 25-26 September 2008, the Military Commission heard evidence on both motions at U.S. Naval Station Guantanamo Bay, Cuba. Transcript at 679-1082, Sept. 25-26, 2008.

During the hearing, over government objection[2] the Military Judge accepted into evidence an unsworn, written declaration, dated 26 September 2008 (the day of the hearing), wherein the accused alleged that on 17 December 2002 Afghan authorities at the Kabul police station had threatened to kill him and his family if he did not confess to the grenade attack. A.E. 106; Transcript at 948-53. The declaration did not allege any threats or mistreatment on the part of U.S. military personnel at FOB 195, who had interrogated the accused later that evening and again the following morning. *See id.*

In light of the allegation of death threats in the accused's written declaration, which had not been provided to either the government or the Military Judge prior to the hearing, the Military Judge requested supplemental briefs and responses on the issue of torture, which the parties submitted on 3 and 10 October 2008. Transcript at 1032; Exhibits D-G. Lacking any ability to probe the validity of the accused's assertions at the hearing itself (since the allegations were made entirely through an unsworn, written declaration and thus not subject to cross examination), the government attached to its supplemental brief a report of follow-up interviews conducted with two of the Afghan authorities involved in the accused's apprehension and interrogation, both of whom denied that the accused or his family had been threatened in any way. *See* Exhibit F, Attach. A.

On 28 October 2008, the Military Judge issued a ruling suppressing the accused's confession to the Afghan authorities. Exhibit C. The Military Judge determined that, based

[2] The Military Judge indicated that the declaration was "admitted into evidence as a remedy for the Government's inability to provide timely discovery to the Defense." Exhibit C at 1.

primarily on the accused's unsworn, written declaration, the death threats alleged therein were "credible" and constituted torture under Military Commission Rule of Evidence (M.C.R.E.) 304(b)(3). *See id.* The Military Judge then concluded that the accused's confession to the Afghan authorities on 17 December 2002 was "obtained by use of torture" and therefore inadmissible under M.C.R.E. 304. *Id.* at 3.

On 19 November 2008, the Military Judge issued a ruling suppressing the accused's confessions to U.S. military authorities at FOB 195. *See* Exhibit B (subsequently amended by Exhibit A). While the Military Judge did not find any threats or mistreatment on the part of the U.S. military interrogator or other personnel at FOB 195, he noted that the accused "was not provided Afghan or American legal counsel or told that his statements to the Afghan police could not be used against him." *Id.* at 2. The Military Judge also found that the accused "admitted to 'rolling a grenade under the American's vehicle and walking away as it exploded,'" despite no testimony to that effect and direct testimony from the U.S. interrogator that the accused admitted to *throwing* a grenade *into* the vehicle, as he has been charged. *See id.* at 2; Transcript at 796; Exhibit K. The ruling also failed entirely to note that the accused had been re-interrogated at FOB 195 the following morning, 18 December 2002, after he had been given food, water, and time to sleep, and confessed to the same conduct as he had the night before. *See* Transcript at 819-20.

Finally, and most importantly, in the 19 November 2008 Ruling, the Military Judge ruled that the accused's confessions to U.S. authorities at FOB 195, having occurred after his confession to the Afghan authorities, were "presumptively tainted" as products of the earlier confession. *See* Exhibit B at 3 (citing *Oregon v. Elstad*, 470 U.S. 298 (1985)); Exhibit A at 3 (amending the original ruling after the government filed its Notice of Appeal on 24 November

2008, to add an elaboration in footnote 5 of his rationale for citing *Elstad*). Specifically, the Military Judge ruled that "[t]o overcome this presumption, the Government must demonstrate by a preponderance of the evidence intervening circumstances which indicate the coercion surrounding the first confession had sufficiently dissipated 'to insulate the [subsequent] statement from the effect of all that went before.'" *Id.* (citing *Clewis v. Texas*, 386 U.S. 707, 710 (1967) (alteration in original)).

The Government filed a timely Notice of Appeal of the 19 November 2008 Ruling and the underlying legal determinations to the Court of Military Commission Review on 24 November 2008. *See* C.M.C.R.R. 14(c)(1). This brief is timely filed within 10 days of filing said Notice of Appeal. *See id.*

STATEMENT OF FACTS

On the afternoon of 17 December 2008, Sergeant First Class Michael Lyons and Sergeant First Class Christopher Martin, U.S. Army, along with their Afghan interpreter, Assadullah Khan Omerk, were driving near a crowded marketplace in Kabul, Afghanistan, when a live hand grenade was thrown into their vehicle. *See* A.E. 87; A.E. 88; A.E. 90 at 6; A.E. 91 at 4. The grenade exploded in the vehicle and sent shrapnel riddling through the victims, causing serious injuries to all three of them. *See* A.E. 91 at 4-5; Exhibit A. As the victims spilled from their vehicle, bleeding profusely and yelling for help, Afghan military and police forces in the vicinity quickly responded and were able to subdue and disarm the accused at the scene of the attack, even as he was preparing to throw a second grenade. *See* A.E. 91 at 4-7. While the victims were rushed off to get medical attention, the accused was transported to the local district police station for questioning. *See* A.E. 91 at 12, 15-16; A.E. 90 at 13.

While in Afghan custody, according to the Afghan authorities who interrogated him, the accused willingly confessed to throwing the grenade, stated that he was proud of his actions, had intentionally targeted Americans and would kill more if given the chance, and was only upset that the interpreter had been hurt. *See* A.E. 90 at 17-19; A.E. 89 at 9. He further stated that he acted alone in the attack but had previously received training at a militant training camp in Pakistan. *See* A.E. 89 at 7-8; A.E. 87; A.E. 88.

After concluding their interrogation, the Afghan authorities turned the accused over to U.S. military authorities later that evening, who transported him to FOB 195. *See* Exhibit A at 2. Once there, the accused was searched and examined by medical personnel for signs of injury and also photographed. *See* Transcript at 830-32; A.E. 102; A.E. 103. A military chaplain was assigned as a human rights observer to ensure he was well treated. *See* Transcript at 829. A trained military interrogator was located, and a team including two interpreters was assembled to attempt to obtain any actionable military intelligence from the accused. *See id.* at 794. The military interrogator was not informed that the accused had previously confessed to the Afghan authorities. *See id.* at 990.

At first, the accused denied responsibility for the attack, but as the interrogation progressed and the tone of the interview became more relaxed, he admitted throwing the grenade into the victims' vehicle. *See id.* at 795-96, 820, 990-94, 996. He informed the interrogator that weeks prior to the attack, he was taken to a training camp where he received weapons training and drugs. *See id.* at 796. He said that during this training, he was instructed to target and attack Americans by rolling a grenade under their vehicle and then casually to walk away before it exploded. *See id.* at 796-98. He understood that he would then be paid for any successful attack. *See id.* at 797-98. He said that when he located the victims in this case, rather than roll a grenade

under their vehicle as he had been trained, he threw the grenade into the vehicle. *See id.* at 796. After it exploded, he was apprehended by Afghan authorities. *See* A.E. 87; A.E. 88.

During the interrogation, the accused was given water and several breaks were taken. *See* Transcript at 821, 990, 994. After the interrogation concluded that night, the accused was given food and allowed to sleep. *See id.* at 819, 991. The following morning, the accused was re-interviewed by the same U.S. military interrogator and again admitted throwing the grenade. *See id.* at 819-20. He was then transferred to a central U.S. military detention facility elsewhere in Afghanistan and eventually transferred to the detention facility at U.S. Naval Station, Guantanamo Bay, Cuba.

ERRORS AND ARGUMENT

1. THE MILITARY JUDGE ERRED BY SUPPRESSING THE ACCUSED'S MULTIPLE CONFESSIONS TO U.S. AUTHORITIES AT FOB 195 BASED ON AN INVALID LEGAL PRESUMPTION THAT THEY WERE "TAINTED" BY HIS PREVIOUS CONFESSION TO AFGHAN AUTHORITIES AND WERE THEREFORE OBTAINED BY USE OF TORTURE.

Summary of Argument

In the 19 November 2008 Ruling, the Military Judge erroneously suppressed the accused's multiple confessions to U.S. military authorities at FOB 195 as statements "obtained by use of torture" under M.C.R.E. 304(a)(1), based on an invalid legal presumption that they were "tainted" by his earlier confession to the Afghan authorities. Such a presumption is unsupported by anything in the Military Commissions Act of 2006 (M.C.A.) or its implementing regulations. Nor are the constitutional precedents from which this presumption is ostensibly

derived applicable to trials by military commission. The 19 November 2008 Ruling of the Military Judge should therefore be reversed and an order entered denying the defense's suppression motion.

Standard of Review

This Court reviews questions of law *de novo*. *See, e.g.*, *United States v. Khadr*, C.M.C.R. 07-001, at 4 (24 Sept. 2007) ("Regarding all matters of law, we review the military judge's findings and conclusions *de novo*.") (citing *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2001); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000); *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)); *Judicial Watch, Inc. v. Fed. Bureau of Investigation*, 522 F.3d 364, 367 (D.C. Cir. 2008) (District Court's interpretation of a statute is reviewed *de novo*); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("Because this case presents a pure question of statutory interpretation, we review the district court's decision *de novo*.").

The Rules Applicable to Military Commissions Do Not Create a Legal Presumption That Subsequent Confessions are "Tainted" By a Previous Confession Determined to Have Been Obtained by Torture, Which the Government Must Affirmatively Overcome Through Evidence of Intervening Circumstances.

Military commissions convened pursuant to the M.C.A., 10 U.S.C. §§ 948a *et seq.*, are entirely a creation of statute, governed by that Act and its implementing regulations. Neither the Act nor its implementing regulations anywhere state that where a confession is obtained by torture, a legal presumption arises that subsequent confessions are "tainted" as a result, requiring evidence of intervening circumstances to overcome that taint. To the contrary, the M.C.A. and its implementing regulations create a far narrower set of exclusionary rules than the constitutional rulings from which this "taint" presumption is ostensibly derived. In reaching

beyond the M.C.A. and its implementing regulations to import such a presumption into military commissions, the military judge erred and should be reversed.

The M.C.A. sets forth its own rules and procedures relating to self-incrimination. 10 U.S.C. § 948r. These rules contain a blanket prohibition against admitting statements "obtained by the use of torture." 10 U.S.C. § 948r(b). The rules allow for admission of statements wherein the degree of coercion is disputed so long as, if obtained before 30 December 2005 (which is the case for all statements at issue here), the totality of the circumstances renders the statements reliable and probative, and the interests of justice are served by their admission. 10 U.S.C. § 948r(c). Finally, the M.C.A. requires that "[a] statement of the accused that is otherwise admissible *shall not* be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r," just discussed *supra*. 10 U.S.C. § 949a(b)(2)(C) (emphasis added).

While its rules and procedures are based largely on those governing courts-martial, the M.C.A. specifically excludes application of Uniform Code of Military Justice (U.C.M.J.) Article 31's provisions relating to compulsory self-incrimination. 10 U.S.C. § 948b(d)(1)(B). Among other things, U.C.M.J. Article 31 includes broad prohibitions against (a) compelling a person to answer incriminating questions; (b) interrogating suspects without informing them of their right to remain silent; and (c) introducing statements into evidence when obtained in violation of this article or through coercion, unlawful influence, or unlawful inducement. 10 U.S.C. § 831. In specifically excluding the above rules from application in military commissions, the M.C.A. intentionally permits that unwarned, incriminating responses elicited through conduct in which the degree of coercion is disputed may be introduced, so long as (1) the conduct does not amount to torture, (2) the statements are shown to be reliable and probative, and (3) their admission is in

the interests of justice. 10 U.S.C. § 948r. Indeed, so long as the totality of the circumstances supports those three conditions, the statement "*shall not* be excluded" from trial by military commission. 10 U.S.C. § 949a(b)(2)(C), *supra*. *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (finding Congress' use of term "shall" indicated intent to "impose discretionless obligations"); *Leecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").

Nowhere in these enactments did Congress create a legal presumption that a confession determined to have been obtained by torture would "taint" all subsequent confessions as themselves products of that torture, unless the government affirmatively introduced evidence of intervening circumstances that "purged the taint." Congress certainly had the power to enact such a presumption, and had before it the same constitutional precedents the Military Judge cites in his ruling, yet Congress included no such rule in the M.C.A.

The reason no such rule was included in the M.C.A. is clear under even the most cursory analysis of the Act's legislative history. Congress' plain intent in passing the M.C.A. was to treat enemy combatant interrogations differently from other types of interrogations. As Representative Duncan Hunter, the Chairman of the House Armed Services Committee, explained in the debates leading up to the M.C.A.'s enactment, "[I]n this new war, where intelligence is more vital than ever, we want to interrogate the enemy . . . to save the lives of American troops, American civilians, and our allies. But it is not practical on the battlefield to read the enemy their Miranda warnings." 152 Cong. Rec. H7925-02, H7937 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter); *see also* Statement of Daniel Dell'Orto, Principal Deputy General Counsel, U.S. Department of Defense, Before the Senate Judiciary Committee, *Re: Military Commissions to Try Enemy Combatants* (July 11, 2006) ("It would greatly impede

intelligence collection essential to the war effort to tell detainees before interrogation that they are entitled to legal counsel, that they need not answer questions, and that their answers may be used against them in a criminal trial.") Put simply, Congress specifically did not intend to make rights advisements a requirement for interrogating enemy combatants, especially by ground troops in a combat zone such as Afghanistan.

That is exactly why the M.C.A., unlike the U.C.M.J., is framed so as not to require rights advisements of any form prior to interrogation. And that is also why Congress saw fit *not* to include a taint presumption for statements that follow from an earlier statement obtained by torture. What, for example, is the principal means law enforcement personnel use to "purge the taint" of an earlier, invalidly obtained confession under case precedents in civilian U.S. courts? A "cleansing" rights advisement—the whole concept of which stems from "cat-out-of-the-bag" taint doctrine. *See United States v. Bayer*, 331 U.S. 532, 540-41 (1947). And what does the Military Judge list as one of the factors he considered in determining whether the "taint" was effectively purged in this case? "(7) the absence of a cleansing statement." 19 November 2008 Ruling at 4. Thus, in his *sua sponte* creation of a taint presumption, premised in no way on the text of the M.C.A., the Military Judge has essentially imported a rights advisement requirement into the military commissions process, where none exists. That constitutes legal error.

In addition to the language and legislative history of the M.C.A., the implementing regulations promulgated by the Secretary of Defense pursuant to his statutory mandate, 10 U.S.C. § 949a(a), also support construing the exclusionary rules for military commissions to exclude any constitutionally derived taint presumption. Since the M.C.R.E. are drawn largely from the Military Rules of Evidence (M.R.E.) used in courts-martial, differences between the two merit careful consideration. The most relevant of these for present purposes is that M.R.E.

304, unlike M.C.R.E. 304, prohibits admitting "derivative evidence" from involuntary statements, except where the judge finds by a preponderance (1) that the statement was made voluntarily (i.e., merely a rights warning violation), (2) that the evidence was not obtained by use of the statement, or (3) that the evidence would have been obtained even if the statement had not been made (i.e., "inevitable discovery"). *See* M.R.E. 304(a), (b). Both the rule and its exceptions were clearly crafted specifically to incorporate constitutional case precedents regarding the use of evidence derived from unwarned and/or coerced statements. *See* Analysis of M.R.E. 304, Manual for Courts-Martial, App. 22, A22-9-10 (2008 ed.).

By contrast, M.C.R.E. 304 contains neither M.R.E. 304(a)'s blanket prohibition against admitting evidence derived from coerced statements, nor M.R.E. 304(b)'s constitutionally-based exceptions for admitting derivative evidence. This is because, like the M.C.A. which it implements, M.C.R.E. 304 is not designed to track domestic constitutional law, but rather to strike a balance between individual rights, the interests of justice, and the exigencies of interrogations that are designed to gather actionable intelligence.

Thus, by purposefully excluding derivative evidence rules, M.C.R.E. 304 underscores the inapplicability of constitutionally derived exclusionary rules like the "taint presumption" that the Military Judge invokes here.[3] The origins of such judicially crafted doctrines, after all, are to protect constitutional rights by deterring *law enforcement agents* from engaging in prohibited practices. *See, e.g.*, *United States v. Weeks*, 232 U.S. 383, 392 (1914) ("The tendency of those

[3] That is, to the extent such a presumption can indeed be derived from the case precedents the Military Judge cites. It is not at all clear, for example, that *Oregon v. Elstad*, 470 U.S. 298 (1985), stands for the proposition that actual coercion at one interrogation creates a *presumption* that statements made at subsequent interrogations are tainted. At best, that principle is only a potential implication of the Court's narrower holding that unwarned admissions involving no actual coercion do *not* create a presumption of compulsion at subsequent interviews. *See id.* at 314. *Cf. Clewis v. Texas*, 386 U.S. 707 (1967) (not applying a presumption of taint in its analysis of subsequent statements); *Lyons v. Oklahoma*, 322 U.S. 596, 604 (1944) (specifically declining to apply such a presumption to analyze subsequent confessions).

who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution. . . ."). By contrast, the military interrogations of the accused at FOB 195 were carried out by military intelligence personnel seeking actionable intelligence to protect against further attacks. The long-recognized "substantial social costs" generated by broad exclusionary rules, *see United States v. Leon*, 468 U.S. 897, 907 (1984), thus increase by orders of magnitude under the exigencies of the combat zone .

In this same vein, the rationale behind the "public safety" exception to *Miranda* also supports not applying constitutional exclusionary rules to military commissions. *See, e.g., New York v. Quarles*, 467 U.S. 649, 651 (1984) (recognizing that a police officer may need to ask a suspect where a weapon is located prior to providing *Miranda* warnings). As the Court in *Quarles* reasoned, since time is of the essence in public safety scenarios, *Miranda* warnings are not appropriate, as they might impede or slow access to vital, actionable information. *See id.* at 657 ("In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding."). Similarly, given the concerns and dangers inherent in a military combat environment—very much like public safety concerns for police, but of a vastly higher order of magnitude—essentially *every* military scenario is a *Quarles* scenario.

Finally, separate and apart from the inapplicability of constitutional exclusionary rules specifically, such constitutional precedents also fail in a broader sense to apply to military commissions cases. There is no precedent for applying constitutional protections to an alien enemy combatant held outside of the United States for alleged violations of the law of war; to the

contrary, there is in fact Supreme Court precedent holding that the Constitution specifically does not apply to aliens under such circumstances.[4]

The accused has no claim to constitutional due process rights based upon his status as an alien unlawful enemy combatant. In *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Supreme Court addressed the narrow question of whether the Suspension Clause of the Constitution, art. I, § 9, cl. 2, applies to alien enemy combatants detained at Guantanamo Bay, Cuba, who are being held based solely upon the determination of a Combatant Status Review Tribunal. The Court concluded that uncharged enemy combatants at Guantanamo Bay must, after some period of time, be afforded the right to challenge their detention through habeas corpus. In reaching that conclusion, the Court considered both the historical reaches of the writ of habeas corpus, *see id.* at 2244-51, as well as the "adequacy of the process" that the petitioners had received. *See id.* at 2262-74.

The Court in *Boumediene* signaled no intention, however, of extending the individual rights protections of either the Constitution or the Bill of Rights to alien enemy combatants like the accused who are tried before a military commission. To the contrary, the Court emphasized that "[i]t bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined." *Id.* at 2277. *Boumediene* was thus

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[4] While the Second Circuit has recently applied the Fifth Amendment to foreign nationals interrogated overseas but tried in U.S. civilian courts, *see In re Terrorist Bombings of U.S. Embassies in East Africa*, 2008 U.S. App. LEXIS 24052 (2008), holdings regarding rights in Article III courts are inapposite to whether those rights apply to trials before military commissions. As the Supreme Court explained in *Ex Parte Quirin*, violations of the law of war, such as that charged in this case, do not constitute "crimes" or "criminal prosecutions" within the meaning of the Fifth and Sixth Amendments:

> In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

Ex Parte Quirin, 317 U.S. 1, 40 (1942).

a decision concerning the separation of powers under the Constitution and the role that Article III courts may play, under the unique circumstances of detention at Guantanamo Bay, in providing judicial review of the detentions of individuals who had not received any adversarial hearing before a court or military commission. *See id.* at 2259 ("[T]he writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers."). In this case, there is no dispute that the accused is an alien, and is being tried before a military commission established by an Act of Congress with the panoply of rights secured by the M.C.A.

The Supreme Court has squarely held that alien enemy combatants held outside the sovereign borders of the United States who have no connection to the United States other than their confinement possess no rights under the Due Process clause, which is significant in this case since this clause is the source of the "presumptive taint" doctrine on which the Military Judge relies in his ruling. *See* 19 Nov. 2008 Ruling at 3 & n.5. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), a group of German nationals—captured in China by U.S. forces during World War II and imprisoned in a U.S. military base in Germany—sought habeas relief in federal court. Although the military base in Germany was controlled by the U.S. Army, the Supreme Court held that these prisoners, detained as enemies outside the United States, had no rights under the Fifth Amendment. *Id.* at 782-85. In so holding, the Court noted that to invest nonresident alien enemy combatants with rights under the Due Process Clause would potentially put them in "a more protected position than our own soldiers," who are liable to trial in courts-martial, rather than in Article III civilian courts. *Id.* at 783. The Court therefore flatly rejected the argument that alien enemy combatants should have more rights than our servicemen and women, holding that the Fifth Amendment had no application to alien enemy combatants detained outside the United States:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it.

Id. at 784-85 (citation omitted).

In *Boumediene*, the Supreme Court cited *Eisentrager* approvingly. *Boumediene*, 128 S. Ct. at 2259 ("[T]he outlines of a framework for determining the reach of the Suspension Clause are suggested by the factors the Court relied upon in *Eisentrager*."). The Supreme Court also "d[id] not question the Government's position that Cuba, not the United States, maintains sovereignty, in the legal and technical sense of the term, over Guantanamo Bay." *Id.* at 2252. Rather, the Supreme Court in *Boumediene* expressly contrasted the petitioners in that case to the litigants in *Eisentrager*:

> The petitioners, like those in *Eisentrager*, are not American citizens. But the petitioners in Eisentrager did not contest, it seems, the Court's assertion that they were "enemy alien[s]." In the instant cases, by contrast, the detainees deny they are enemy combatants. They have been afforded some process in CSRT proceedings to determine their status; but, unlike in *Eisentrager*, there has been no trial by military commission for violations of the laws of war. The difference is not trivial. The records from the *Eisentrager* trials suggest that, well before the petitioners brought their case to this Court, there had been a rigorous adversarial process to test the legality of their detention. The *Eisentrager* petitioners were charged by a bill of particulars that made detailed factual allegations against them. To rebut the accusations, they were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses. In comparison the procedural protections afforded to the detainees in the CSRT hearings are far more limited, and, we conclude, fall well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review. . . .

Id. at 2259-60 (alteration in original) (citations omitted). The Supreme Court has recognized that the writ of habeas corpus historically has had an "extraordinary territorial ambit." *Rasul v. Bush*,

542 U.S. 466, 482 n.12 (2004). Hence, even if the accused could claim an entitlement under *Boumediene* to rights under the Suspension Clause, the Supreme Court's decision did not, in any terms, upset the well-established holding that other individual rights principles of the Constitution do not apply to alien enemy combatants lacking any voluntary connection to the United States.

Indeed, the Court has made clear—in precedents that *Boumediene* did not question—that the individual rights provisions of the Constitution run only to aliens with a substantial connection to our country and not to alien enemy combatants detained abroad. *See United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990). Even when an alien is found within United States territory (as was the nonresident alien in *Verdugo-Urquidez*), the degree to which constitutional protections apply depends on whether the alien has developed substantial *voluntary* contacts with the United States. *See Verdugo-Urquidez*, 494 U.S. at 271. In the present case, each of the accused's contacts with the United States, which consist solely of unlawfully waging war against the Nation and being detained in a U.S. military base, "is not the sort to indicate any substantial connection with our country." *Id.*; *see also Eisentrager*, 339 U.S. at 783 (finding "no authority whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses").

Boumediene's holding was thus premised on the unique role of habeas corpus in policing the separation of powers in our constitutional system, and on a factual difference between *Eisentrager*'s petitioners and those in *Boumediene*. *See Boumediene*, 128 S. Ct. at 2259. Nothing in *Boumediene*, however, casts doubt on *Eisentrager*'s well-established (and subsequently applied) rejection of the proposition that the Constitution applies *in toto* to nonresident aliens. *Boumediene* certainly does not extend the Constitution's individual-rights

protections, contrary to *Eisentrager*, *Verdugo-Urquidez* and other cases, to alien unlawful enemy combatants before congressionally constituted military commissions.

Because the Supreme Court did not disturb those holdings in *Boumediene*, they remain binding precedent before this Commission. As the Court explained in *Agostini v. Felton*, 521 U.S. 203 (1997), "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* at 237-38 (citation omitted); *see also Public Citizen v. U.S. Dist. Court for Dist. of Columbia*, 486 F.3d 1342, 1355 (D.C. Cir. 2007) ("The Supreme Court has repeatedly cautioned that 'we should [not] conclude [that its] more recent cases have, by implication, overruled an earlier precedent.'") (alteration in original) (quoting *Agostini*, 521 U.S. at 237). Hence, one simply cannot read *Boumediene* to have silently overruled the Supreme Court's existing precedents and to provide a new multi-factored test for the analysis of other constitutional rights. It is clear that the test enunciated by the Court to determine whether the Suspension Clause applied to the *Boumediene*-petitioners was specifically geared toward measuring only whether the Suspension Clause—and not any other constitutional provision—applies to those petitioners. *Boumediene*, 128 S. Ct. at 2237. As that test was intended by the Court only to resolve the limited issue before it, it is inapposite to the question whether other portions of the Constitution apply to alien detainees at Guantanamo.

In conclusion, the Military Judge's application of a presumption of taint, which the government is affirmatively required to overcome, has no basis under the M.C.A., its legislative history, its implementing regulations, or the constitutional rulings from which the Military Judge borrowed it. The application of this presumption constitutes legal error, and should be reversed.

PRAYER FOR RELIEF

WHEREFORE, the Government respectfully prays that this Court reverse the Commission's ruling suppressing the accused's confessions to U.S. authorities at FOB 195, and order the accused's confessions at FOB 195 admissible as a matter of law.

2. THE MILITARY JUDGE ERRED IN SUPPRESSING THE ACCUSED'S MULTIPLE CONFESSIONS TO U.S. AUTHORITIES AT FOB 195 AS OBTAINED BY USE OF TORTURE DUE TO THE ACCUSED'S PREVIOUS CONFESSION TO AFGHAN AUTHORITIES, WHEN THE SUBSEQUENT CONFESSIONS OCCURRED HOURS LATER, IN A DIFFERENT LOCATION, IN THE CUSTODY OF A DIFFERENT GOVERNMENT, WHOSE INTERROGATOR WAS WEARING A DIFFERENT UNIFORM, SPEAKING A DIFFERENT LANGUAGE, AND NOT EVEN AWARE OF THE EARLIER CONFESSION.

Summary of Argument

In his 19 November 2008 Ruling, the Military Judge erroneously held that the accused's multiple confessions to U.S. military authorities at FOB 195 were "obtained by use of torture" under M.C.R.E. 304 and therefore suppressed them. As noted above, he reached that conclusion by erroneously applying a legal presumption that the accused's confession to U.S. authorities was "tainted" because the Military Judge found that the accused's earlier confession to Afghan authorities was obtained by use of torture. Instead, the Military Judge should have examined the totality of the circumstances in which the statements to U.S. authorities were made to determine directly whether those statements were "obtained by use of torture" under the M.C.A., or were otherwise the product of coercion. When the proper test is applied, the facts in the record

demonstrate that the accused's confessions at FOB 195 were not "obtained by use of torture," as those interrogations were distinct in time, location, governmental custodian, language, and other relevant factors from the preceding interrogation by the Afghan authorities. The 19 November 2008 Ruling of the Military Judge should therefore be reversed and an order entered denying the defense's suppression motion.

Standard of Review

An appellate court reviewing a trial court's order granting a motion to suppress accepts the trial court's factual findings unless clearly erroneous and considers the evidence in the light most favorable to the trial court. *United States v. Lopez*, 437 F.3d 1059, 1062 (10th Cir. 2006). However, the ultimate issue of voluntariness of the confession is reviewed *de novo* to render an independent determination, taking into account the totality of the circumstances based on an examination of the entire record. *Id.* (citations omitted). With respect to the underlying motion, once the issue of coercion is raised, the government bears the burden of establishing the admissibility of a confession by a preponderance of the evidence. *See* M.C.R.E. 304(e); R.M.C. 905(c)(1).

The Evidence in the Record Does Not Support Finding That the Accused's Confessions at FOB 195 Were Obtained By Torture or Even Coerced under M.C.R.E. 304.

As discussed at length *supra*, rather than apply a presumption of taint, the Military Judge instead should have directly analyzed the totality of the circumstances surrounding the confessions made at FOB 195 in applying M.C.A. Section 948r and M.C.R.E. 304—i.e., was the particular statement under consideration "obtained by use of torture," and if not, is the degree of coercion disputed? If the answer to the first question is "yes," then the statement is inadmissible. If the answer to the first question is "no," but the answer to the second question is "yes," then the

commission must consider the statement's reliability and probative value, and whether admitting it would be in the interests of justice.

In analyzing the first question, the frame of reference for assessing whether a particular statement is "obtained by use of torture" is whether the interrogator to whom it was made used torture to get it. Otherwise, if the analysis includes actions that happened outside the particular interrogation that produced the statement (in this case the interrogations at FOB 195), then "obtained by use of torture" takes on the aura of a derivative evidence rule, which M.C.R.E. 304 was specifically drafted to exclude, or else it blurs into the coercion analysis governed by M.C.R.E. 304(c).[5] Simply put, derivative evidence of the sort contemplated here—linking subsequent confessions, temporally or otherwise, to a previous confession made to different interrogators—simply does not fall within the meaning of "obtained by use of torture" under M.C.R.E. 304(a)(1).

Another reason to construe "obtained by use of torture" in this fashion is that M.C.R.E. 304(b)(3) defines torture as "an act '*specifically intended*'" to inflict severe physical or mental pain or suffering." M.C.R.E. 304(b)(3) (emphasis added). In this case, the accused's confessions at FOB 195 could not have been "obtained by use of torture" unless the FOB interrogator *specifically intended* to inflict severe pain or suffering. That simply was not the case, as none of the military personnel assigned to interrogate the accused intended to torture him in any way or for any reason. Thus, by requiring the perpetrator of the torture to have specific

[5] It is the Government's position that issues of taint involving a separate, second confession should be analyzed under M.C.R.E. 304(c), rather than M.C.R.E. 304(a)(1). To follow the lead of the Military Judge below, and to call an interrogation by U.S. forces "torture" in the complete absence of any allegation of misconduct by those forces, is irresponsible and damaging both to U.S. interests and to the professional interests of such U.S. interrogators. It is also legal error.

intent, M.C.R.E. 304 purposefully narrows the focus of the inquiry to an individual interrogator in an individual interrogation.[6]

Federal civilian courts have agreed that specific intent is the necessary *mens rea* for proving torture. In *Pierre v. Attorney General of the United States*, 528 F.3d 180 (3rd Cir. 2008) (en banc), for example, the U.S. Court of Appeals for the Third Circuit, *en banc*, considered an appeal by a Haitian citizen claiming that deporting him to Haiti would violate the Convention Against Torture,[7] upon which the M.C.R.E. definition of torture is patterned. Pierre claimed that he would suffer torture in Haiti due to the lack of adequate medical care he would receive in detention there. *Id.* at 182. In denying Pierre's claim, the Third Circuit squarely held that "specific intent" was required to prove torture.

Pierre argued that "the specific intent requirement can be satisfied by a showing that the Haitian officials have knowledge that severe pain or suffering is the practically certain outcome . . . ." *Id.* at 189. The Third Circuit rejected that argument, holding that "specific intent requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose accomplishing a specific and prohibited result." *Id.* The court further explained that "[m]ere knowledge that a result is substantially certain to follow from one's actions is not sufficient to form the specific intent to torture." *Id.*

In this case, the FOB officials not only lacked the *mens rea* required to establish torture, but the *actus reus* as well, for none of their actions even amounted to mistreatment. Yet that is

[6] This analysis would of course allow for the consideration of the fact that a hypothetical interrogator, knowingly acting in concert with another interrogator, could possess the specific intent to torture a declarant. In this case, of course, there is no evidence that the FOB interrogator engaged in any such concerted action.

[7] Codified at 18 U.S.C. § 2340.

essentially what the Military Judge has found, in ruling that the accused's confessions at the FOB were "obtained by use of torture."

That finding is simply not supported on the totality of the circumstances in this case. Indeed, even employing a "presumptive taint" or similar derivative evidence type of analysis, the evidence rebuts any presumption of taint. First, since the evidence in the record of death threats allegedly made by the Afghan authorities amounts to no more than a two-page, unsworn declaration from the accused, this Court stands in no worse position than the Military Judge in assessing these allegations' credibility based on the four corners of the document.[8] Even if this Court sees fit to simply accept the declaration at face value, as the Military Judge did, taken in conjunction with all the other evidence, the subsequent confessions given at FOB 195 are sufficiently attenuated from any claimed unlawful conduct to be admissible.

In civilian criminal courts, a voluntary confession provided by a suspect on the heels of a previously coerced confession is admissible if the effects of the original coercion have dissipated. Courts examine a number of factors to determine if the effects of coercion have dissipated, including the time between the coercion and subsequent voluntary confession, the change in location of interrogations and the change in interrogators. *See Oregon v. Elstad*, 470 U.S. 298, 310 (1985) ("When a prior statement is actually coerced, the time that passes between

[8] This is particularly true when M.C.R.E. 304(f) specifically provides that an accused may give limited-purpose testimony on suppression motions, in which case cross-examination is limited "to the matter on which he or she testifies" and "[n]othing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement." M.C.R.E. 304(f). Under such circumstances, the Military Judge's acceptance and virtually exclusive reliance on an unsworn statement from the accused, and apparent disinclination even to acknowledge contrary evidence from the Afghan authorities who interrogated him, is error.

To be clear, the Government believes that the Commission's 28 October ruling was also erroneous (and may subsequently seek reconsideration before the Military Judge on it); however, the Government elected not to appeal that ruling, in part, because it was still awaiting the 19 November ruling and did not want to delay the trial unnecessarily. Although the earlier ruling is not expressly the subject of the instant appeal, to the extent the Commission in its 19 November ruling adopted and relied upon its earlier findings, *see* 19 November Ruling at 2-3, the 28 October ruling is relevant to the matter now under review.

confessions, the change in place of interrogation, and the change in identity of the interrogators all bear on whether that coercion carried over into the second."). This analysis has been consistently used to admit confessions even when police officers violate the Fifth Amendment by coercing suspects to confess.

In *Berg v. Maschner*, 2000 U.S. Dist. LEXIS 22612 (N.D. IA 2000), the U.S. District Court determined that a voluntary confession following threats and beatings by police officers was constitutionally admissible. The defendant in *Berg* was accused of shooting and killing a police officer. After being taken into custody, the defendant made three separate incriminating statements: once at the crime scene, 10 minutes after the shooting; next at the police station, 30 minutes after his first confession; and finally during a formal interrogation at the police station. *See id.* at 4-5. The formal interrogation commenced only one hour after the second confession and approximately 2 ½ hours after the shooting. *See id.* at 6. On petition for *habeas* relief, Berg claimed his third confession should have been suppressed because the police had already threatened and beaten him at the "scene of the crime and at the police station," and as a result his third confession was not voluntarily made and improperly admitted at his trial. *See id.* at 10. The government did not dispute those claims, but instead argued the third confession was attenuated from any prior police misconduct. The Iowa Supreme Court held the 2 ½ hours between arrest and confession, the change of interrogators, and the move to a different room where the confession was taken presented "a sufficient break in the stream of events to insulate the confession made by the defendant during the [3rd interrogation] from the two prior tainted statements." *Id.* at 27 (citing *State v. Berg*, 404 N.W.2d 592, slip op. at 6). The U.S. District Court agreed. *Id.* at 29.

In *Holland v. McGinnis*, 963 F.2d 1044 (7th Cir. 1992), the U.S. Court of Appeals for the Third Circuit reached a similar result using the same analysis. In *Holland*, the defendant happened upon a young woman and her boyfriend , who were on the side of the road as a result of a flat tire. The defendant brandished a knife and drove off alone with the woman and raped her. He was arrested hours later. After his arrest, the defendant claimed that the police severely beat him to get him to confess. *Id.* at 1047 (defendant alleged the police "kicked, hit, and knocked [him] to the ground, punched and beat[] [him] with a nightstick, raised [him] off the floor by elevating his handcuffed arms behind him, and [pulled] his hair") (citing *People v. Holland*, 497 N.E.2d 270, 287 (1987)). Six hours after his arrest, the defendant was transported to another police station where he confessed again. The prosecution did not rebut the defendant's claims. The trial court suppressed the first confession, but admitted the second confession because it found the taint of the original coercion was dissipated.

In reviewing the conviction, the Seventh Circuit concluded that the subsequent confession, taken a mere six hours after the severe beatings, was voluntarily made by the defendant in *Holland*. *Id.* at 1050-51. Of particular significance was the fact that the police who administered the beatings were not present for the subsequent confession. The court reasoned that "Holland must have recognized the difference between [the first set of interrogators] and [the second set of interrogators] in terms of atmosphere and the treatment accorded him by his interrogators." *Id.* at 1051. Indeed, the court acknowledged that the effects of Holland's beating by police had not "completely disappeared" by the second confession, "but rather, due to the break in the stream of events" the admission of his confession did not violated the U.S. Constitution. *Id.*

While for the reasons outlined above the Court should not employ a "presumptive taint" lens as a means of analyzing the FOB interrogation, it may well be necessary and appropriate to determine if the accused's subsequent confessions were sufficiently attenuated from the Afghan interrogation to be admissible under the coercion analysis of M.C.R.E. 304(c).[9] As the above cases demonstrate, even where the Fifth Amendment does apply, circumstances such as those present in the case *sub judice* are more than sufficient to attenuate any taint of coercion, and render a subsequent confession admissible. The accused's confession to the U.S. military interrogator at FOB 195 is admissible because (a) when considered in light of the totality of the circumstances it was not obtained by use of torture, is probative and reliable, and it is in the interests of justice to admit it, and (b) even if a presumption of taint is applied, any taint from the earlier alleged threats at the Afghan police station are sufficiently attenuated.

The subsequent confessions were made to different interrogators, from a different government, in a different location, at a different time. The accused was transported from the custody of the Afghan officials to where the FOB was located, searched and medically examined there prior to any interrogation, interrogated by an entirely different interrogator from an entirely different government, speaking an entirely different language. The U.S. interrogator was not involved with the Afghan interrogation and was not even informed that the accused confessed during the earlier interrogation. As the U.S. interrogator described, by the time he made his initial confession at the FOB, the tone of the interrogation was more casual and the accused appeared relaxed and not afraid to speak. In addition, the accused was re-interviewed by the

[9] This is precisely what the Military Judge declined in his ruling to do. 19 November 2008 Ruling at 5.

military interrogator the following morning, after eating and sleeping, and gave the same incriminating statements as the night before.

Finally, the accused does not claim that the U.S. authorities ever threatened or mistreated him. If anything, his treatment by the military authorities at the FOB was an outstanding example of how the military should handle itself in such situations. The accused was not mistreated; the interrogation was by a trained interrogator using textbook techniques; and by the time the accused confessed, he was relaxed and calm, strongly suggesting that the statements he made were reliable and freely given. He was also given water and food and allowed to sleep before the follow-up interview the following morning, in which he reiterated the same confession.

Under the totality of the circumstances, the accused's confessions at the FOB were reliable and probative, and their admission is warranted by the interests of justice under M.C.R.E. 304(c).

PRAYER FOR RELIEF

WHEREFORE, the Government respectfully prays that this Court hold the Military Judge erred in finding the accused's confessions to U.S. authorities at FOB 195 were obtained by torture and in granting the defense motion to suppress; reverse the Commission's suppression order; and hold that the accused's confessions at FOB 195 are admissible as a matter of law.

APPENDIX

Exhibit A: *United States v. Jawad*, Ruling on Defense Motion to Suppress Out-of-Court Statements Made By the Accused While in U.S. Custody, D-021 (Military Commission 19 November 2008) (Henley, J.) (amended version)

Exhibit B: *United States v. Jawad*, Ruling on Defense Motion to Suppress Out-of-Court Statements Made By the Accused While in U.S. Custody, D-021 (Military Commission 19 November 2008) (Henley, J.) (original version)

Exhibit C: *United States v. Jawad*, D-022 Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities (Military Commission 28 October 2008) (Henley, J.)

Exhibit D: *United States v. Jawad*, Government Response to Defense Brief on the Issue of Torture Under M.C.R.E. 304 (D-021, D-022) (10 October 2008)

Exhibit E: *United States v. Jawad*, Defense Response to Government Brief on the Issue of Torture Under M.C.R.E. 304 (D-021, D-022) (10 October 2008)

Exhibit F: *United States v. Jawad*, Government Brief on the Issue of Torture Under M.C.R.E. 304 (D-021, D-022) (3 October 2008)

Exhibit G: *United States v. Jawad*, Defense Court-Ordered Brief Regarding D-021 and D-022 (3 October 2008)

Exhibit H: *United States v. Jawad*, Government's Response to Defense Motions to Suppress (D-021, D-022) (22 September 2008)

Exhibit I: *United States v. Jawad*, Defense Motion to Suppress All Out-of-Court Statements By the Accused Made While in U.S. Custody (D-021) (18 September 2008)

Exhibit J: *United States v. Jawad*, Defense Motion to Suppress Out-of-Court Statements By the Accused Due to Coercive Interrogation (D-022) (18 September 2008)

Exhibit K: *United States v. Jawad*, Referred Charges (30 January 2008)

Exhibit L: *United States v. Jawad*, Sworn Charges (9 October 2007)

Respectfully submitted,

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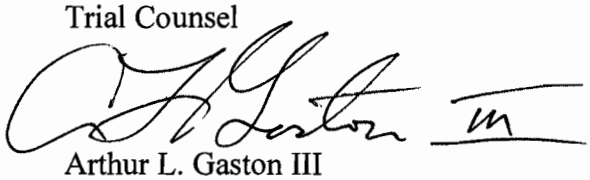

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MOTION FOR ORAL ARGUMENT

Pursuant to C.M.C.R.R. 17, the Government respectfully moves for expedited oral argument on the issues presented, that is, (1) whether under the rules applicable to trial by military commission a determination that an earlier confession was obtained by torture creates a legal presumption that subsequent confessions are "tainted" by the earlier confession, which the government must affirmatively overcome by evidence of intervening circumstances, and (2) whether the military judge erred in suppressing the accused's confessions at FOB 195 as "tainted" by his previous confessions to Afghan authorities, when the subsequent confessions occurred hours later, in a different location, in the custody of a different government, wearing a different uniform and speaking a different language, and whose interrogator was not even aware of the earlier confession.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 14(i)

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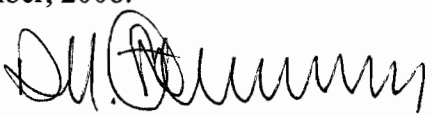
Dated: 4 December 2008

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was e-mailed to David A. Frakt, Maj, USAF, Detailed Defense Counsel, on this 4th day of December, 2008.



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